

be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty. So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence? The answer to that is that the appropriate sentence in these circumstances would not have been more than three years. That points to the fact that this sentence was rather on the heavy side, because it did not give sufficient allowance for the plea of guilty."

When we asked ourselves the same question here, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. Clearly on this test, the sentence imposed on the appellant was manifestly excessive. It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilty, the sentence must also be discounted to reflect the full restitution made and the other mitigating factors. Although the learned judge indicated in his judgment that he had given the necessary discounts, they were not reflected at all in the sentence imposed. We were satisfied from his judgment that the learned judge had imposed the eight years' sentence purely on the basis of extending twice as long the English guidelines found in *Barrick* and the sentence imposed in *Davies*, without regard to the particular facts of this case and without giving the appellant any or sufficient credit for all the mitigating circumstances. The recommended prison terms in *Barrick* were not meant for pleading-guilty cases. If the learned judge had not fallen into error in misreading the facts and the law in *Barrick* and *Davies*, he would probably have found that a four-year sentence would adequately fit the crime which by any standard was severe enough to satisfy the justice of this case. In our view, the fact that our Penal Code had prescribed a longer maximum sentence for section 409 offences than for similar crimes in England did not justify the imposition of a sentence more severe than what the gravity and circumstances of the offence would warrant. It was wrong in principle to double without any good reason what would otherwise be an adequate and fair period of imprisonment. Since full restitution had been made and the appellant had not enriched himself personally by the crime, we found no purpose in imposing a fine in addition to custodial sentence.

Bearing in mind all those matters, we have allowed this appeal by reducing the sentence im-

A posed on the appellant to four years' imprisonment from the date of his arrest, and by setting aside the fine of \$100,000.00.

Appeal allowed.

B Solicitors: *Dulip Singh & Co.*

C **ABDUL KARIM BIN ABDUL GHANI v.
LEGISLATIVE ASSEMBLY OF SABAH**

[S.C. (Hashim Yeop A. Sani S.C.J.)
September 7, 1987]

D [Kuala Lumpur — Supreme Court Civil Application
No. 21 of 1987]

E *Constitutional Law — Application for leave to commence proceedings for declaration that law enacted by legislature of State of Sabah is invalid on ground that the legislature concerned has no power to enact it — Application frivolous — Leave refused — Constitution (Amendment) Enactment, 1986 of Sabah — Federal Constitution, arts. 4(3) & (4), 74(4), Eighth Schedule and Ninth Schedule.*

F *Legal Profession — Whether States of Malaya advocate and solicitor is qualified to appear before judge of Supreme Court in Kuala Lumpur — Advocates Ordinance (Sabah, Cap. 2), s.8.*

The applicant applied for leave to commence proceedings for a declaration that the Constitution (Amendment) Enactment, 1986, of Sabah is invalid on the ground that the legislature of Sabah has no power to enact it. The declarations sought were as follows:

- G (a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.
- H (b) a declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondent's incompetence to enact the same.

I **Held:** (1) the subject of disqualification of a member of the Legislative Assembly of the State is a State subject and it is also obvious that disqualification is a subject within the competency of a State;

(2) if the new provision in the Constitution (Amendment), Enactment, 1986, is regarded as a provision for the tenure of seats of members of the State Legislature, then it is certainly a State matter clearly falling under Item 7 (Machinery of State Government) of the State List;

(3) reading Item 7 of the State List with Article 74(4) of the Federal Constitution it is obviously within the power of the State Legislature to enact a law in the nature of the new Article 18(2)(d) of the Sabah Constitution;

(4) the application is frivolous and leave should be refused.

Cases referred to:

- (1) *East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor.* [1980] 2 M.L.J. 143.
- (2) *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46, 49.

SUPREME COURT.

Mohamed Shafee Abdullah (B. Sugumar with him) for the applicant.

Stephen Foo Kiat Shin, State Attorney General, Sabah, for the respondent.

Hashim Yeop A. Sani S.C.J.: On May 20, 1986, the Yang di-Pertua Negeri of the State of Sabah gave his assent to an enactment cited as the Constitution (Amendment) Enactment 1986 which came into force on that date. That constitution amendment amended Article 18 of the Constitution of the State of Sabah, adding a new provision whereby an elected member shall vacate his seat in the Assembly if he resigns or is expelled from, or for any reason whatsoever ceases to be a member of, the political party of which he is a member. The applicant was at time of filing of the application an elected member of the Legislative Assembly of the State for the constituency of Bongawan and was a member of the United Sabah National Organisation (USNO), a duly registered political party in that state. The applicant in his affidavit expressed a fear that disciplinary action might be taken against him by USNO which would result in his expulsion and the consequences which follow. His fear was completely justified for by the time the application came to be heard he was already expelled from USNO. As a result of the expulsion and by virtue of the new Article 18(2)(d) of the Sabah Constitution he was required to vacate his seat and the seat was then declared vacant. The Election Commission then issued a writ to hold a by-election and the by-election will be held on September 19, 1987.

A preliminary objection was raised at the outset of the proceeding for leave. The objection was on the qualification of Encik Shafee Abdullah to appear for the applicant. It was contended by Encik Stephen Foo that section 8 of the Advocates Ordinance of Sabah (Cap. 2) would apply and since Encik Shafee is not appearing for the government (Federal or State) he is not qualified to appear before the Supreme Court. It is to be noted that the words "to practice in Sabah" are defined in section 2 of the Ordinance to mean "to perform in Sabah"—

A tes Ordinance of Sabah (Cap. 2) would apply and since Encik Shafee is not appearing for the government (Federal or State) he is not qualified to appear before the Supreme Court. It is to be noted that the words "to practice in Sabah" are defined in section 2 of the Ordinance to mean "to perform in Sabah"—

B

"(a) any of the functions which in England may be performed by a member of the Bar as such; or

(b) any of the functions which in England may be performed by a Solicitor of the Supreme Court of Judicature as such."

C

The present proceeding is under Article 4(4) of the Federal Constitution before a judge of the Supreme Court. The seat of the Supreme Court is Kuala Lumpur and the hearing is in Kuala Lumpur. Therefore section 8 of the Ordinance does not apply and Encik Shafee, a States of Malaya advocate and solicitor, is qualified to appear in the proceeding.

D

Now we come to the application for leave. The application is under Article 4(4) of the Federal Constitution. Proceedings for declaration under Article 4(4) of the Federal Constitution that a law is invalid on the ground mentioned in clause 4(3), that is the legislature concerned has no power to enact it, shall not be commenced without leave of the judge of the Supreme Court. This requirement does not apply to proceedings between Governments (Federal and State) under paragraphs (a) or (b) of Article 4(3) of the Constitution. See also *East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor.*⁽¹⁾

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The applicant seeks for the following declarations.

"(a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.

H

(b) a declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondents' incompetence to enact the same."

I

Although the declarations are not ideally worded or presented it is understood by reading the two declarations together that the applicant is seeking for a specific declaration that that part of the Constitution (Amendment) Enactment No. 3

of 1986 of Sabah carrying the addition of Clause 2(d) of Article 18 of the Sabah Constitution is invalid. It is the contention of the applicant that the State Assembly is not empowered to make laws with respect to a matter of disqualification. It is the applicant's contention also that the said clause 2(d) of Article 18 of the Constitution of Sabah is inconsistent with the "essential provisions" contained in Part I of the 8th Schedule to the Federal Constitution. Under the same argument it is contended that the legislature of the State of Sabah has illegally and unconstitutionally usurped the powers of Parliament to legislate on the same subject as provided for by Article 74(1) of the Federal Constitution and item 6 of the Federal List.

There is no doubt in my mind that the subject of disqualification of a member of the Federal Parliament is a Federal subject. The subject of disqualification of a member of the Legislative Assembly of the State is a State subject. This is clearly put in paragraph 6 of the Eighth Schedule to the Federal Constitution being one of the essential provisions required by the Federal Constitution to be incorporated in the State Constitution. Disqualification in relation to membership of the legislature of the State is within the competency of the State legislature to enact is indeed recognised by Federal law in the Election (Conduct of Elections) Regulations 1981 where Regulation 7 thereof allows objection to nomination to be made on the ground, *inter alia*, that the candidate is disqualified from being a member under the provision of the Constitution of the State concerned in the case of an election to a State Legislative Assembly.

It is also obvious in the provision of paragraph 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State. Paragraph 5 reads as follows:

"Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be a member of the Legislative Assembly, unless he is disqualified for being a member by the Federal Constitution or this Constitution or by any such law as is mentioned in section 6 of the Eighth Schedule to the Federal Constitution."

Paragraph 5 has been carried as Article 16 of the Sabah Constitution word for word. The words "this Constitution" of course refer to the State Constitution of Sabah.

Finally if the new provision is regarded as a provision for the *tenure* of seats of members of the State legislature then it is certainly a State matter

A clearly falling under Item 7 (machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Federal Constitution reads:

B "Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter."

C Reading Item 7 of the State List with Article 74(4) it is obviously within the power of a State legislature to enact a law in the nature of the new Article 18(2)(d) of the Sabah Constitution.

D The object and purport of Article 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2)*⁽²⁾ by Pike C.J. (Borneo) with which interpretation I agree. Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity. In order to secure that frivolous or vexatious proceedings for such declarations are not commenced, Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

F In my opinion the application is frivolous and leave should be refused and is accordingly refused.

G Under the circumstances I need not deal with the eleventh hour oral application of Encik Shafee to add two new parties, namely the Yang di-Pertua Negeri of Sabah and the State Government of Sabah.

Notice of Motion dismissed.

H Order accordingly.

Solicitors: *Sugumar & Co.*

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